International Association of Bridge, Structural & Ornamental Ironworkers, Local 380 *and* Laborers' Local Union 703, Laborers' International Union of North America, AFL-CIO and Stobeck Masonry Incorporated. Case 33-CD-270

23 August 1983

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND ZIMMERMAN

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Laborers' Local Union 703, Laborers' International Union of North America, AFL-CIO, herein called Laborers, alleging that International Association of Bridge, Structural & Ornamental Ironworkers, Local 380, herein called Ironworkers, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring Stobeck Masonry Incorporated, herein called the Employer, to assign certain work to its members rather than to employees represented by Laborers.

Pursuant to notice, a hearing was held before Hearing Officer Robert W. Chester on 14 December 1982. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Ironworkers filed a brief with the Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer, a Delaware corporation with an office and place of business located in Decatur, Illinois, is engaged in the business of commercial building construction. During the preceding 12 months, a representative period, the Employer purchased and received goods valued in excess of $50,000 from points outside the State of Illinois. During that same period, it had a gross volume of business in excess of $500,000. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that Laborers and Ironworkers are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

The Employer operates as a mason contractor. McBro Construction, a general contractor, subcontracted masonry work at its Carle Hospital addition construction site in Urbana, Illinois, to the Employer. The Employer assigned the erection of scaffolding at this project to its employees represented by Laborers.

On or about 17 November 1982, the Employer, through its superintendent, Lenny Bridges, informed Jim Felkner, Laborers field representative, that the Employer intended to switch from Morgan scaffolding[1] to patent scaffolding.[2] Laborers then began erection of the patent scaffolding.

On Monday, 22 November 1982, Felkner received a phone message from Bridges requesting that he come over to the Carle Hospital construction site. Felkner arrived at approximately 12:10 p.m. and was informed by Bridges that Ironworkers, through its business agent, Darrel Hansgen, was claiming the work of erecting and dismantling the patent scaffolding. Shortly thereafter, Felkner met with Hansgen and Werner Stolper, the Employer's president. Hansgen told them that "the laborers ain't going to do it or we're going to picket this thing." As they discussed the Ironworkers claim, a member of Ironworkers drove by them. Hansgen told him, "Just stick around here, you might be walking a picket." Felkner, Hansgen, and Stolper then went inside McBro's trailer and there-

[1] Morgan scaffolding was constructed by a composite crew of laborers and carpenters. It is erected with poles and starts from the ground up. There is a tower every 7 feet which resembles a television tower or tripod. Ironworkers makes no claim to the construction of Morgan scaffolding.

[2] Patent scaffolding is also referred to in the record as Chicago scaffolding and Chicago stage. For clarity the term patent scaffolding is used throughout this Decision and Determination of Dispute. Patent scaffolding differs from the types of scaffolding generally used by the Employer. Patent scaffolding is constructed with multiple outriggers (steel beams which resemble railroad track) which hang from the roof over the side of a building. The outriggers are bolted to anchors which are set in concrete. After the outriggers have been positioned, a rope with a hook attached is lowered from the roof to a worker on the ground. At this point a cable is attached to the hook and drawn up from a spool on the ground and strung to the outrigger. In the instant case there are 35 outriggers and 70 cables involved.

Patent scaffolding is meant to carry significantly heavier loads than other types of scaffolding. It is designed to move up the face of one or more walls at the same time. It is the construction of patent scaffolding only which is in dispute in this case.

in discussed the situation with Jerry Brittain, an employee of McBro, and John Blackstock, superintendent for another subcontractor on the project. Blackstock asked Hansgen, "Before you shut it down, let me know, or get ahold [sic] of me, or whistle." Hansgen then whistled.

The parties agreed to discuss the situation with the general contractor and to get back together after lunch. Felkner went to another appointment and returned to the jobsite around 1:30 p.m. At that time two ironworkers had already replaced the laborers and were finishing the erection of the patent scaffolding. Felkner approached Bridges and was advised that the Employer had reassigned the erection of the patent scaffolding to ironworkers.

B. *The Work in Dispute*

The work in dispute involves the erection and dismantling of patent scaffolding at the Carle Hospital addition construction site located in Urbana, Illinois.

C. *Contentions of the Parties*

Laborers takes the position that (1) its continuing relationship with the Employer, (2) its collective-bargaining agreement with the Employer, and (3) the Employer's original assignment of the disputed work support an award of the work to employees it represents.

The Employer contends that the original assignment of the work in dispute to the employees represented by Laborers is supported by the collective-bargaining agreement and its past practice of assigning the construction of scaffolding to laborers and carpenters.

Ironworkers takes the position that, by virtue of its collective-bargaining agreement with the Employer, its members are entitled to the work in dispute. It asserts that it has traditionally been area and industry practice to assign to ironworkers the erection and dismantling of patent scaffolding, which is fundamentally different from other types of scaffolding; that all ironworkers are skilled and trained in the erection and dismantling of patent scaffolding; and that ironworkers receive training in the inspection of cable and rigging. It also contends that ironworkers, based on their superior training and experience, will perform the disputed work more economically and more efficiently. On the basis of the foregoing, Ironworkers asserts that its members ought to be assigned the disputed work.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

It is clear from the record summarized above that Ironworkers claimed the work in dispute and threatened to picket the Carle Hospital addition construction site with the object of forcing the reassignment of work from employees represented by Laborers to employees represented by Ironworkers. In addition, the parties have stipulated that since around 1 June 1981, the Impartial Jurisdictional Disputes Board, which the parties had agreed would resolve this jurisdictional dispute, has been inoperative, and thus leaves them without a viable privately agreed-upon method of resolution.

On the basis of the entire record, we conclude that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.[3] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[4]

The following factors are relevant in making the determination of the dispute before us:

1. Collective-bargaining agreements

Through its membership in the Central Illinois Builders Association and the Central Illinois Builders of AGC, the Employer is a party to collective-bargaining agreements with Ironworkers and Laborers, respectively. Each contract appears to cover the work in dispute, although neither provides specifically for the erection and dismantling of patent scaffolding.

The Laborers contract at article 22, "Jurisdiction of Work," includes "Scaffolding (building of scaffolds and staging for Masons and Plasterers)."

The Ironworkers contract at paragraph 3, "Scope of Work," provides:

[3] *N.L.R.B. v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961).

[4] *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

> The Agreement shall cover all employees employed by the Employer engaged in work coming under all classifications listed under the trade autonomy of the International Association of Bridge, Structural and Ornamental Ironworkers.

At the hearing there was unchallenged testimony that the erection of patent scaffolding falls under the classification of rigging which is included in the trade autonomy of Ironworkers.

We conclude that this factor does not favor either Union over the other.

2. Area and industry practice

Felkner testified that laborers have, in the past, erected and dismantled Morgan scaffolding, swinging scaffolding, and hanging scaffolding on numerous jobsites in the area; he testified that laborers had never previously constructed patent scaffolding for the Employer. Felkner did not testify that laborers have constructed patent scaffolding for any other employers. Laborers also introduced into evidence letters from three contractors who have employed laborers for the construction of scaffolding. However, of these three letters only one mentions patent scaffolding and that letter does not specify any particular site at which the laborers constructed such scaffolding.

Hansgen testified that he was aware of no project during his 14-year tenure as business agent for Ironworkers where patent scaffolding had been constructed by other than ironworkers.[5] In addition to Hansgen's testimony, Ironworkers produced letters from three contractors attesting to their assignment of the construction of patent scaffolding to ironworkers. These letters identify six projects at which ironworkers constructed patent scaffolding; included among those six projects were the Carle Clinic addition and remodeling, the University of Illinois East Chemistry Building first addition, and the Mercey Hospital addition, all located in Urbana, Illinois.[6] Ironworkers also called as witnesses James Andrews and Edward Sheehan, both superintendents for area contractors which have contracts with Laborers and Ironworkers. Each of these witnesses testified that he had been a supervisor for his employer for more than 20 years; each testified that he assigned the construction of patent scaffolding exclusively to ironworkers; and each testified that he knew of no project at which the construction of patent scaffolding had been assigned to anyone other than ironworkers. The testimony of Sheehan and Andrews corroborated the evidence presented in the letters regarding the use of patent scaffolding at the three Urbana, Illinois, projects listed above. In addition, Andrews testified that ironworkers had constructed the patent scaffolding used by his employer at the Blessing Hospital construction site in Quincy, Illinois, and Sheehan testified that ironworkers had constructed the patent scaffolding used at the Jeffery Housing Project in Detroit, Michigan.

We conclude that area and industry practice strongly favors an award of the disputed work to employees represented by Ironworkers.

3. Skills, training, and safety

Steve Sheehan, an instructor in the Ironworkers Apprenticeship and Training Program, testified that ironworkers attend the program for 3 years. The program's standard curriculum provides instruction in rigging, the construction and use of wire rope, the erection of scaffolding, including specific instruction on patent scaffolding, and the safety requirements accompanying the construction and use thereof. Sheehan testified that an ironworker in the course of his work comes into contact with cable "virtually all the time." Ironworkers also introduced segments of its training manuals which document the attention given to patent scaffolding, rigging, and the use and construction of cable in the program.

Laborers offered no evidence of a program comparable to that of Ironworkers. It maintains, however, that the construction of patent scaffolding requires no such training as it is performed under the supervision of the Employer's supervisor and is basically a nonskilled job.

We find that Ironworkers training program has some relevance to the work in dispute. Contrasted with Laborers lack of familiarity with safety requirements and the materials used in the construction of patent scaffolding, the specific training received by ironworkers as it applies to the unique nature of patent scaffolding leads us to conclude that the factors of relative skills, training, and safety tend to favor an award to employees represented by Ironworkers. Ironworkers obvious experience advantage bolsters the conclusion.

4. The Employer's past practice and preference

The Employer had not previously had occasion to use patent scaffolding, which differs fundamen-

[5] Hansgen also testified that the Ironworkers International office informed him of four disputes between affiliates of Laborers and Ironworkers over the construction of patent scaffolding. From Hansgen's testimony it appears that the dispute on each occasion was resolved voluntarily and in favor of the Ironworkers affiliates.

[6] The other projects were the Lauhoff Grain Company, Danville, Illinois; the Oakwood Power Plant, Oakwood, Illinois, both in the Urbana area; and the Tishman Construction Company's project at an undesignated campus of the University of Illinois.

tally in respect to materials used, method of construction and function from all other types of scaffolding it customarily used. Stolper, the Employer's president, testified that the Employer prefers to have the disputed work performed by employees represented by Laborers because it employs such employees for other work and does not regularly employ ironworkers. Accordingly, the Employer's preference, though not its past practices, favors assignment of the disputed work to the employees represented by Laborers.

5. Economy and efficiency

Stolper testified that two to three individuals, whether laborers or ironworkers, will be needed to complete the disputed work. He estimated that the dismantling of the patent scaffolding will take somewhere between 48 to 80 man-hours. Hansgen testified that only two ironworkers would be needed to complete the disputed work and that they would do so in approximately 32 man-hours. The Employer contends that laborers are more convenient and will be more economical since it already employs them for other tasks at the construction site, but there is no evidence that production was in any way disrupted by the replacement of laborers with ironworkers to complete the erection process here, or that use of ironworkers to complete the job will result in inefficient work scheduling for the laborers. Given that the timing of the disputed work can be forecast with considerable precision, it is reasonable to infer that the Employer will hire only as many ironworkers as are necessary only for as long as is necessary to complete the work and that it will reduce its complement of laborers by a corresponding number. Ironworkers maintains that its apprenticeship and training program, which, as noted above, includes specific instruction regarding patent scaffolding, will enable ironworkers to perform the disputed work more efficiently.

Since the conflicting testimony regarding personnel and man-hours is speculative, and since the Employer's testimony regarding convenience and economy appears to be little more than a reflection of its preference because of its ongoing bargaining relationship with Laborers concerning different work, we find that the factors of economy and efficiency do not clearly favor either Union.

Conclusion

Ironworkers introduced detailed and uncontradicted evidence which establishes that the prevalent area practice in the Champaign-Urbana locale is to assign the construction of patent scaffolding to its members. Additionally, the factors of relative skills, training, and safety provides further support for an award of the work to ironworkers. Laborers, on the other hand, never asserted that its members in fact had constructed patent scaffolding. The Board is reluctant to disturb a well-defined area practice in the construction industry absent some compelling reason.[7] Employer preference is not by itself such a reason.[8] Therefore, upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees who are represented by Ironworkers are entitled to perform the work in dispute and we shall determine the dispute in their favor. In making this determination, we are awarding the work in question to employees who are represented by Ironworkers, but not to that Union or its members. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF THE DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

Employees who are represented by International Association of Bridge, Structural & Ornamental Ironworkers, Local 380, AFL-CIO, are entitled to perform the work of erection and dismantling of patent scaffolding at the Carle Hospital addition construction site located in Urbana, Illinois.

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[7] *Carpenters (Midwest Exhibits)*, 217 NLRB 190 (1975).

[8] Although the Board normally accords employer preference considerable weight, it has consistently maintained that an employer's assignment of work "cannot be made the touchstone in determining a jurisdictional dispute." *Carpenters Local 1102 (Don Cartage Co.)*, 160 NLRB 1061, 1078 (1966); see *Plasterers Local 80 (Jack Ebert & Co.)*, 226 NLRB 242 (1976). Indeed, resort to such a mechanistic approach would violate the Supreme Court's directive in *CBS, supra*. Thus, when unsupported by other factors, employer preference will not be controlling. See *Carpenters Local 1102, supra; Plasterers Local 80, supra; and Ironworkers Local No. 229 (M. H. Golden Construction)*, 218 NLRB 1144 (1975).

In the instant case, the Employer based its preference for Laborers on convenience. It presented no evidence that a contrary assignment will adversely affect its operations nor did it support its preference with considerations of skill, area practice, or economy and efficiency. Indeed, the Employer's participation in the instant case was minimal. The Employer never filed charges. At the hearing, it called no witnesses, introduced no exhibits, and cross-examined no witnesses. Furthermore, the Employer left the hearing before its close and filed no brief. Employer's preference merits little weight in these circumstances.